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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TOWN OF ATHERTON, et al.,

Plaintiffs and Petitioners,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, et al.,

Defendants and Respondents.

TOWN OF ATHERTON, et al.,

Plaintiffs and Petitioners,

v.

CALIFORNIA HIGH-SPEED RAIL AUTHORITY, et al.,

Defendants and Respondents.

Case No. 34-2008-80000022

[consolidated with 34-2010-80000679]

CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S REPLY BRIEF IN SUPPORT OF RETURN AND MOTION TO DISCHARGE WRITS

Date: November 9, 2012
Time: 9:00 a.m.
Dept: 31
Judge: Honorable Michael P. Kenny
Action Filed: August 8, 2008
October 4, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

Petitioners' Joint Opposition to Respondent's Return and Motion to Discharge Peremptory Writs of Mandate ("POB") argues the Court should require more analysis in the California High-Speed Rail Authority's (Authority's) Bay Area to Central Valley program environmental impact report (Program EIR). The entire Opposition Brief is premised on the notion that a "blended system approach" to implementing the high-speed train (HST) between San Francisco and San Jose, as described in the Authority's 2012 Business Plan, changed its first-tier project, and should have been studied in yet another round of a recirculated program EIR. But the entire suite of arguments in the Opposition Brief - project description, alternatives, responses to comments, and recirculation - fails, because the blended system approach to implementing the HST on the Peninsula is a component of a more detailed, second-tier project. The blended system discussion in the Business Plan did not change the first-tier project, which has consistently been depicted in the EIR as the policy decision for the general HST route from the Central Valley into the Bay Area. Nor did the blended system discussion in the Business Plan render the Program EIR's range of 21 network alternatives unreasonable.

The facts in the record demonstrate that the Authority grappled with all the HST system implementation concepts in the Business Plan, including the blended system approach. The Partially Revised Draft and Final Program EIRs both described and analyzed the consequences of a blended system approach to implementation at a programmatic level. Likewise, the Program EIR discussed how a blended system approach to implementation at the second-tier would have implications for the first-tier decision. Information and analysis about the blended system was therefore squarely before the public and before the Authority Board when it acted to approve the project, fulfilling CEQA's informational purposes. The Authority has now corrected all identified CEQA problems, and Petitioners fail to show there are more. The Authority respectfully requests that the Court discharge the writs and relinquish jurisdiction over this matter.

ARGUMENT

I. THE PROGRAM EIR HAS AN ACCURATE, STABLE, AND FINITE PROJECT DESCRIPTION.

Petitioners claim the EIR's[1] project description violates CEQA because it shifted and was unstable. (POB, pp.7:3-10:16.) CEQA requires an EIR project description to be accurate, stable, and finite. (*Sierra Club v. County of Orange* (2008) 163 Cal.App.4th 523, 533 citing *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1448.) An EIR that describes a proposed project in multiple inconsistent ways does not suffice. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655-56 [EIR project description inadequate where it included conflicting statements about whether substantial increase in mining included]; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189-90 (*County of Inyo*) [EIR project description inadequate where it included conflicting information about whether groundwater extraction and export included].) There is no shifting project description in this case.

The thrust of Petitioners' argument is that there were discrepancies between the Authority's Revised 2012 Business Plan, the Final Program EIR, and the addendum, and under the *County of Inyo* case these discrepancies deprived the public of the ability to provide meaningful comments on the EIR. (POB, pp. 8:16-10:16.) This argument fails for two reasons. First, the Revised 2012 Business Plan, which has a unique legislatively-mandated purpose, did not change the first-tier project studied in the Program EIR, but instead presented information about how the Authority would implement *second-tier* projects. Second, the EIR itself, as well as other documents from the environmental process including the addendum, have stably and consistently described the first-tier project as the policy choice of the general route from the Central Valley into the Bay Area. The Court should reject Petitioners' attempt to concoct an aura of confusion by conflating the first-tier and second-tier projects and decisions. Substantial evidence shows the EIR project description was accurate, stable, and finite and served CEQA's information disclosure purpose.

[1] This brief uses the same nomenclature used in Respondent's Memorandum of Points and Authorities in Support of the Return and Motion to Discharge Writs (ROB) (e.g., Partially Revised Program EIR is referred to as "the EIR" or "the Program EIR").

A. The Revised 2012 Business Plan Did Not Change the First-Tier Project Studied in the EIR.

Petitioners' project description claim fails because there is simply no "disjunction" between the first-tier project in the Program EIR and the blended system discussion in the Business Plan that made the EIR project description shift. The two documents are separate; they serve two separate purposes. (2012AR_000301.) In contrast to the Program EIR, which supports CEQA compliance for the *first-tier* policy decision of selecting the HST route into the Bay Area, the Business Plan is a strategic plan, required by the Authority's governing statute, and focused on how the second-tier projects will unfold into an operating HST system. (See generally, Pub. Utils. Code, § 185033, subd. (a); 2012AR_014713 [Business Plan, Exec. Summ.], 014749-84 [Business Plan, Ch. 2].) The Business Plan thus lays out a road map for how and when individual pieces of the HST system (e.g. second-tier projects) will be built over time, and the finances and risks involved. (Pub. Utils. Code, § 185033, subd. (a); see 2012AR_014713, 014731 [Business Plan]; 000301-02.)[2] This content responds to the statutory requirement that the Business Plan, "[i]dentify the expected schedule for completing environmental review, and initiating and completing construction for each segment of Phase 1." (Pub. Utils. Code, § 185033, subd. (b)(1)(C); see also 2012AR_014722, 014749-014784 [Business Plan implementation strategy emphasizes how to phase HST system construction by dividing and prioritizing second-tier projects for construction and operation in light of funding and budget realities].)

While the Business Plan is consistent with the HST system described in the Program EIR, it is not, nor should it be, coextensive with the first-tier project described in the Program EIR. (2012AR_014770, 014783 [Business Plan distinguishes Program EIR "project"].) Petitioners ignore the explanation in the EIR which emphasizes that the EIR is tailored to the first-tier, general policy decision of where to place the HST system between the Bay Area and the Central Valley. (2012AR_000302-03 ["planning approval at hand involves the fundamental choice of a

[2] Pursuant to Public Utilities Code section 185033, the Legislature has required the Authority to submit to it a business plan in January 2012, and then ever two years thereafter. (Pub. Utils. Code, § 185033, subd. (a).) A public comment process and a public hearing are required. (*Id.*, § 185033, subd. (b)(2).)

preferred alignment..."]; 000164 [describing use of EIR in selection of preferred network alternative].) The EIR further explains that the 2012 Business Plan's blended system concepts for San Francisco to San Jose are promising implementation approaches for the second-tier project, but that these more detailed, second-tier implementation concepts do not change the nature of the first-tier project. (2012AR_000303-04.)[3] Petitioners are thus inappropriately mixing first-tier apples with second-tier oranges. The fact that the 2012 Business Plan discusses implementing the San Francisco to San Jose second-tier project with the blended system approach does not shift, change, or make inaccurate the Program EIR's first-tier project description.

The California Supreme Court faced a very similar argument in *Bay-Delta*. (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143 (*Bay-Delta*).) In that case, the petitioners challenged a program EIR on a first-tier planning project to improve the Sacramento/San Joaquin Rivers Delta. (*Id.* at p. 1152.) The Court of Appeal held that the lead agency had to recirculate its program EIR to include details about a second-tier project called the environmental water account that the lead agency had released in a strategic plan shortly before certifying the final program EIR. (*Id.* at p. 1174.) The Court held the environmental water account had to be studied at the first tier, in the program EIR, reasoning that tiering cannot be used as an excuse to defer analysis of the significant impacts of the first tier project. (*Ibid.*) The Supreme Court disagreed, explaining that under CEQA's tiering rules, "it is proper for a lead agency to use its discretion to focus a first-tier EIR only on the general plan or program, leaving project-level details to subsequent EIRs when specific projects are being considered." (*Id.* at pp. 1174-75.) The details of the environmental water account were appropriately deferred to a second-tier CEQA document. (*Id.* at p. 1175.)

[3] Comments submitted by one petitioner recognize that the specifics of implementing such a system on the Peninsula are under study by Caltrain, and that the process of implementing such a system on the Peninsula would involve second-tier, project-level environmental analysis. (See, e.g., 2012AR_000499-505 [TRANSDEF letter]; 000523-543 [Att. 5 to TRANSDEF letter, Caltrain Capacity Analysis Update]; 000544-594 [Att. 6 to TRANSDEF letter, Draft Caltrain/California HSR Blended Operations Analysis].) These documents specify that subsequent work to be undertaken in order to design a blended system of operations includes engineering, maintenance, and environmental clearance. (See, e.g., 2012AR_000548.)

This case is like *Bay-Delta*. The Program EIR provides an adequate analysis of the potential impact differences of a more limited blended system approach to implementation on the Peninsula, such as fewer adverse impacts, and fewer environmental benefits than a four track option. (2012AR_000243-44; 000304-06.) The Program EIR also identifies the implications of a blended system approach for the first-tier decision. (2012AR_000249, 264; 000306-07.) Like the environmental water account in the *Bay-Delta* case, the blended system approach for San Francisco to San Jose is defined in the Business Plan as an aspect of *second-tier* projects to implement the HST system. (2012AR_014770.) Since the origin of the blended system idea in 2011, the Authority has consistently treated it as an implementation approach for the second-tier project.[4] Accordingly, the *general* information and analysis about the blended system approach to implementation was properly included in the Program EIR. (*Bay-Delta, supra*, 43 Cal.4th at p. 1175.) The *details* about a blended system approach to implementing the HST system between San Francisco and San Jose were appropriately reserved for a second-tier EIR, especially since no decision about a blended system or specific HST operations was being made at the first tier. (*Ibid.*; 2012AR_000303-04.)

The facts here are even more compelling than in *Bay-Delta* because in that case, the lead agency was determining independently when to release developing information about second-tier projects. Here, the Legislature requires the Authority to prepare and submit a business plan every two years. (Pub. Utils. Code, § 185033.) Inappropriately conflating the second-tier discussion in the bi-annual business plan with the first-tier project in the Program EIR has the potential to place the Authority in a never-ending loop, in which its evolving ideas to move the HST system forward at the second tier, as required in the business plan, force the agency to continuously go

[4] (2012AR_011528-47 [April 2011 presentation of phased implementation approach as part of second-tier project EIR work]; 010530-33 [July 2011 Board memo regarding phased/blended options for second-tier project and direction halting further work on San Francisco to San Jose project EIR]; 000304 [Std. Resp. 1 explains that details to be evaluated at the second-tier include the following elements of a blended approach: how high-speed trains would interact with Caltrain commuter rail on existing track infrastructure, what grade separation enhancements would be implemented, and where passing tracks would be planned]; *Bay-Delta*, 43 Cal.4th at p. 1177 [evidence showed lead agency intended environmental water account as second tier project].).

back and reanalyze its decisions at the first-tier. CEQA mandates no such illogical result. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132 [Legislature did not intend to promote "endless rounds of revision and recirculation of EIRs"] (*Laurel Heights II*).)

Finally, Petitioners' suggestion that the Business Plan disavowed a four track alignment between San Francisco and San Jose, creating a shifting project description, is simply wrong. (POB, 7:9-8:15.) The Business Plan does not disavow a four track alignment. Petitioners *admit* in their brief that the Business Plan identifies the potential for a "Full Build" between San Jose and San Francisco. (POB, pp. 7:26-27, 8:10-11, 10:13-14; see 2012AR_014726, 014796.)[5] But even if the Business Plan never mentioned a four track alignment between San Francisco and San Jose, this would not create a shifting project description in the Program EIR. As discussed above, the Business Plan is a strategic implementation plan. It emphasized the blended system approach as the most promising way to implement the HST system at the second tier, in the heavily urbanized "bookend" sections including between San Francisco and San Jose. (2012AR_014769.) There is nothing about this emphasis that changes the first-tier project in the Program EIR.[6]

B. The EIR Consistently Describes the First-Tier Project As A Decision on the General Route Into the Bay Area with General Station Locations; The Addendum Did Not Change the Project Description.

Petitioners also claim the Program EIR's project description shifted because the Authority's addendum "redefines the project that had been laid out just a week earlier in the Business Plan." (POB, p. 8:14-15.) This is irrelevant. Even if the addendum was inconsistent with the Business

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[5] Although not entirely clear, it appears Petitioners claim the "shared use" strategy in the Business Plan was in some way inconsistent with the Program EIR project description. (POB, p. 7:14-28.) This is not correct. The Program EIR project description for the San Francisco to San Jose alignment along the Caltrain Corridor has consistently been described as shared use. (2012AR_003456 [2008 PEIR]; 000177 [Ch. 2 FEIR]; 000270 [Ch. 6 FEIR]; see 000305.)

[6] Moreover, the Business Plan did not redefine the HST System. (2012AR_000302.) The system map remained the same. (2012AR_000268; AR C022247 [system map from 2005 statewide Program EIR]; 2012AR_014773 [Business Plan system map].) The Business Plan acknowledged that if the Authority were to select the Altamont Pass route into the Bay Area, the Business Plan maps would have to be adjusted. (2012AR_014783.)

Plan, which as discussed below it is not, this would not support Petitioners' argument that the *Program* EIR's project description shifted.

The relevant point is that the record shows the Program EIR has never wavered in describing the first-tier project as selection of an HST network alternative and preferred alignments to connect the Bay Area and Central Valley, along with general station locations. (2012AR_000164.) "The purpose of this revised program EIR process is to provide the necessary analysis to support the selection of a network alternative to connect the Bay Area and Central Valley, via the Altamont Pass, via the Pacheco Pass, or via both passes." (*Ibid.*) The generality of this location decision is shown in Figure 6-1, depicting a general route in blue, with station locations identified by city. (2012AR_000268.) "The planning approval at hand involves the fundamental choice of a preferred alignment within the broad corridor between and including the Altamont Pass and the Pacheco Pass for the HST segment connecting the San Francisco Bay Area to the Central Valley." (2012AR_000302-03 [citing consistent content in 2008 Final Program EIR, 2010 Revised Final Program EIR, and 2012 Partially Revised Final Program EIR]; see also 2012AR_000307 [Draft and Final EIR and all notices "consistently describe the first-tier project as selection of a preferred network alternative and station location options"].)[7] Approval of the first-tier, general location of the HST would set the stage for further study in a second-tier EIR, not allow for construction. (2012AR_000303.)

Related documents that are part of the CEQA environmental review process are similarly consistent in describing the first-tier project as a general decision about the route into the Bay Area. These documents include all notices (2012AR_006843; 006951), staff presentations (2012AR_018408; 018760), and the Authority's April 19, 2012, decision (2012AR_000004 [referring to project as "route selection for the HST system from the Central Valley into the Bay Area"]; 000006 [approving only Pacheco Pass Network Alternative]; 000012-13 [describing

[7] "The Program EIR/EIS enables the Authority and FRA to evaluate the potential impacts of proposed HST system alignment and station locations in the Bay Area to Central Valley corridor, select preferred alignments and station locations, and define general mitigation strategies to address any potentially significant adverse impacts." (2012AR_003372-73 [2008 PEIR].)

general location decision for HST train]; 000013-14 [focus of Program EIR on broad policy choice of network alternative and station locations].)

The same is true for the addendum. The Authority issued the addendum to provide additional, programmatic information about how the phased implementation concepts in the Revised 2012 Business Plan would affect the Program EIR's discussion of first-tier project benefits. (2012AR_018994.) "This additional information does not constitute a change in the proposed high-speed train system. . . ," but was provided to ensure that the potential lower range of project benefits was acknowleged and considered in the first-tier decision making process. (*Ibid.*) The addendum therefore summarizes key assumptions in the Revised 2012 Business Plan, and explains how phased implementation would lead to lower ridership, and therefore lower project benefits. (2012AR_018995-99.) Counter to Petitioners' insistence that the addendum and the Business Plan are different (POB, p. 8:4-12), the addendum simply recounts what the Business Plan portrays, which is a potential four track alignment "Full System" in 2033. (2012AR_018994-99; 014726 [Business Plan].)

Substantial evidence in the record thus squarely distinguishes the facts of this case from *County of Inyo*, cited by Petitioners. In that case, the EIR itself was replete with internal inconsistencies in describing what the City of Los Angeles' water export project included. (*County of Inyo, supra*, 71 Cal.App.3d at pp. 196-97.) The Court of Appeal therefore held that the shifting nature of the project description prevented intelligent public participation. (*Id.* at p. 197.) As shown above, no such shifting project description is part of the Program EIR. The project description was accurate, stable, and finite, and served CEQA's information purpose.

II. THE EIR'S RANGE OF ALTERNATIVES CONTINUES TO BE REASONABLE.

To meet their burden to show that the EIR's range of alternatives was not reasonable, Petitioners must lay out the evidence favorable to the Authority, and show why it is lacking. (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-35.) Petitioners have unsuccessfully challenged the Program EIR's range of alternatives at previous stages of this litigation; Petitioners also fail to make the required showing here in their argument that the

blended system approach in the Business Plan and the letter from the Peninsula Corridor Joint Powers Board ("Caltrain"), commenting on the potential capacity constraints in implementing the blended system approach, render the range of alternatives unreasonable. Furthermore, Petitioners failed to exhaust their administrative remedies on the latter issue.

An EIR must contain a reasonable range of alternatives, permitting a reasoned choice and informed decision making. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565-66 ("*Goleta II*"), *Bay-Delta, supra,* 43 Cal.4th at p. 1163; CEQA Guidelines § 15126.6, subds. (a), (f).) The Partially Revised Program EIR's alternatives analysis involved 21 representative network alternatives, set forth in detail in the 2008 Final Program EIR. (2012AR_004203.) Supreme Court and appellate case law confirms that the EIR's approach of providing a substantive, program-level discussion of the impacts associated with a blended system approach, including impacts associated with the potential for a capacity constraint referenced in the Caltrain comment letter, was appropriate for a first-tier EIR. (2012AR_000243-44, 249; *Bay-Delta, supra*, 43 Cal.4th at p.1174-75; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 378-79 (*Rio Vista*); *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 744 (*Al Larson*).) Substantial evidence shows that the EIR's alternatives analysis was reasonable and complied with CEQA, even in light of the Revised 2012 Business Plan and its discussion of a blended system approach.

A. The Blended System Approach for Implementing a Second-Tier Project Between San Francisco and San Jose Did Not Undermine the Reasonableness of the Range of Alternatives in the Program EIR.

Petitioners' argument, that the blended system approach renders the EIR's range of alternatives unreasonable, stumbles out of the gate. As described in section I, *supra*, the blended system approach is an implementation concept for the second-tier project, not a change to the first-tier project. Because the blended system approach is an implementation concept for the second-tier, *it is not a separate first-tier alternative. Rio Vista* and *Al Larson* directly support the proposition that a first-tier EIR can properly tailor its alternatives to the first-tier project, rather than future, second-tier projects. In *Rio Vista*, the lead agency approved a hazardous waste plan with site selection criteria, and also suggested a preferred site, but did not study any alternatives

to the plan that addressed specific hazardous waste facility locations. (*Rio Vista*, *supra*, 5 Cal.App.4th at pp. 378-79.) The Court of Appeal held that the range of alternatives was appropriately tailored to the "general" nature of the hazardous waste plan. (*Id.*) *Al Larson* involved a port master plan EIR that studied, as the CEQA project, a plan to increase port capacity. (*Al Larson, supra*, 18 Cal.App.4th at p. 742.) The EIR identified by location anticipated projects to support the capacity increase, which were described as second-tier projects; the alternatives considered in the EIR were alternatives for the overall development of the port, not location alternatives for the anticipated projects. (*Id.* at 742-44.) The Court of Appeal, citing *Rio Vista*, held that the EIR's study of alternatives to the overall plan was adequate for the purposes of the EIR and the EIR was not deficient for failing to study alternatives to the locations of the anticipated second-tier projects. (*Id.* at p. 745-46.) Under *Rio Vista* and *Al Larson*, the Authority's program-level analysis of the blended approach was reasonable; the Authority was not required to elevate the implementation strategy of a blended system to a first-tier alternative. (See also *Bay-Delta*, *supra*, 43 Cal.4th at p.1174-75, discussed in § 1, *supra*.)

Thus, under the tiering case law, where no decision has been made about a second-tier project, the impacts of second-tier projects (to the extent understood) can be analyzed at a general, program level and there is no need to analyze aspects of that second-tier project as an alternative. There could be many different ways to implement a blended system approach to a second-tier project, but these details have not yet been decided and do not need to be analyzed. (2012AR_016095-96 [passing track proposed, with significant variations in extent (6-10 miles) and location (areas around Mountain View, Belmont, or San Bruno)]; see, e.g., Atherton 1 Ruling, p. 27:19-23 [where 2010 Revised Program EIR had not made a decision about vertical profile, deferring analysis of site-specific details appropriate].) Petitioners do compare the blended system approach to the 2010 Revised Program EIR's analysis of the vertical profile issue (POB, p. 16:6-14), but the comparison of whether the Program EIR analyzes a "worst case" is not on point. Again, the Court determined that the Program EIR's focus is the routing decision, and it was necessary for the Authority to analyze the full build (outside envelope) for the horizontal alignment of the alternatives under study, in order to make that routing decision.

(2012AR_000307 [Std. Resp. 1].) The horizontal alignment is not a site-specific design detail like the vertical profile; it is the project itself.

Even if the blended system approach for San Francisco to San Jose could be considered an appropriate candidate for a first-tier alternative, however, the Program EIR's alternatives analysis was still reasonable and fostered informed public participation and decision making. Substantial evidence shows the Authority directly addressed the blended system approach in the context of two proposals for "alternatives" raised in comments to the Draft EIR: (1) a combination of the Altamont Corridor Rail Project (ACRP) alignment with a San Francisco to San Jose blended system leg, and (2) a blended approach for the corridor between San Francisco and San Jose, as part of one of the alternatives already under study that utilizes the Caltrain corridor. (See, e.g., 2012AR_000431 [Cmt. 58-143], 000662 [Cmt. 35-62], 000671 [Cmt. 38-188].) The Authority asked its experts to carefully examine the blended system approach, and to consider the two proposals; the result is documented in a technical memorandum. (2012AR_015882-98.)

The EIR explained that the ACRP-blended proposal is not a reasonable alternative for the programmatic project under study. (2012AR_000237 [Ch. 5]; 000308-09 [Std. Resp. 1]; see 015893-98.) As the Court has previously recognized, the ACRP is a slower, regional rail service that serves a different purpose than the HST system, and is developing under different design criteria than the HST system, including a more curved alignment and no requirement for passing tracks at stations. (Atherton 2 Ruling, p. 20:22; 2012AR_000237 [Ch. 5]; 015894.) The substantial additional track mileage and travel time would mean that an alignment based on the ACRP, with blended service on the Peninsula, would be so slow that it would be inconsistent with the purpose and need of the HST system. (2012AR_015894-98.)

The EIR also explained that a proposal involving a blended approach appended onto one of the existing alternatives utilizing some or all of the Caltrain corridor, does not require further examination of alternatives because such a proposal does not represent a new and distinct locational approach. (2012AR_000308-09 [Std. Resp. 1]; see 015891 [listing alternatives using corridor].) The fundamental choice studied by the Program EIR is whether to locate the high-speed train over the Altamont Pass, or over the Pacheco Pass; to this end, 21 representative

network alternatives were studied. A blended approach using the Caltrain corridor could be appended to either an Altamont Pass or a Pacheco Pass routing. (2012AR_000249 [Ch. 6]; 015890-92.) The fundamental locational decision is not altered based on whether a blended approach to implementation is added to those 21 alternatives; what is of critical importance is that the program-level *impacts* of a blended system approach are analyzed as to how they *might affect that fundamental locational decision.* (*Rio Vista, supra*, 5 Cal.App.4th at p. 379 [EIR offered "sufficient information to permit a reasonable choice of potential project alternatives"].) Here, the Program EIR provided that informative and substantive first-tier analysis of impacts associated with the blended system approach. (2012AR_000243-44; 019032 [April 19 meeting transcript].) The blended proposal was not treated as a stand-alone alternative in the text, but there was no reason for it to be treated as such when it was squarely addressed in the EIR, and was the focus of public discussion and comment. (CEQA Guidelines, § 15126.6, subd. (c) [EIR need only briefly describe alternatives considered but eliminated from detailed consideration]; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 992-93 [EIR adequate by identifying suggested alternative, explaining reasons for excluding it from analysis].)

Thus, even attempting to understand the blended system as two distinct, full-fledged first-tier alternatives, substantial evidence shows that evaluating a blended system as an alternative did not merit further consideration.

B. The Caltrain Comment Letter Did Not Undermine the Reasonableness of the Range of Alternatives in the Program EIR

To seek judicial relief under CEQA, a party must first exhaust its administrative remedies; if a party fails to do so, the court must deny relief due to lack of jurisdiction. (Pub. Resources Code, § 21177; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417-420.) Project opponents must voice their grievances with specificity during the CEQA administrative process so that the lead agency has an opportunity to respond. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197 (*Coalition for Student Action.*) The exhaustion of administrative remedies doctrine bars Petitioners' claim that the Caltrain letter required the Authority to reopen its consideration of project alternatives, as

discussed in section III, *supra*. Petitioners submitted multiple comments and failed to identify this issue at all, much less in the context of requiring reopening of the EIR's alternatives analysis.

Even if Petitioners had exhausted administrative remedies on this issue, nothing about the Caltrain comment letter would render the range of alternatives studied in the EIR unreasonable. Unlike the UPRR letter submitted during preparation of the 2008 Final Program EIR, which categorically refused to allow the Authority to use its right-of-way, nothing about the Caltrain comment letter affects the decision at the heart of the Program EIR process: the locational decision for where to place the high-speed train. The letter expresses Caltrain's willingness to collaborate with the Authority on a blended approach to implementation of the high-speed train project on Caltrain's right of way, a willingness also evidenced in other Caltrain documentation. (2012AR_000409 [letter]; see 016076-016167 [Caltrain/California HSR Blended Operations Analysis, March 2012]; 019416-17 [Caltrain press release].) The letter highlights a potential capacity constraint to the implementation of the high-speed train project, in that, as the EIR notes, a blended system approach assumes two to four high-speed trains per hour per direction during peak periods on the Peninsula, as compared to an assumed ten trains per hour under a full build system. (2012AR_000244.) But this potential capacity constraint of a blended system approach was disclosed and commented upon. (2012AR_000307 ["With a blended system, however, the HST would have less frequency . . . "]; see 000244; 000304-07 [Std. Resp. 1]; 000649 [Cmt. 33-502 commenting on capacity constraint].) Most importantly, the EIR provided information and analysis sufficient to enable the Authority Board to evaluate whether the blended strategy approach, including its potential capacity constraints, had any impact on the fundamental choice between Altamont Pass and Pacheco Pass. (2012AR_000307 [contrasting impact of reduced frequency on Altamont and Pacheco; describing lesser frequency disadvantage for Altamont with capacity constraint]; 019057, 019084 [April 19 Board meeting discussion of blended strategy approach].) There is no reason for the Authority to adjust its alternatives analysis in response to the Caltrain comment letter, when the key concept of a potential capacity constraint was addressed in the EIR. The EIR's analysis complied with CEQA, because it provided for public participation and informed decision making. (*Goleta II, supra*, 52 Cal.3d at pp.572-73.)

III. THE EIR'S RESPONSES TO COMMENTS COMPLY WITH CEQA

Petitioners claim the Final EIR's responses to a series of comments asking that the blended system be studied as an independent, first-tier alternative were inadequate. They also claim that the Authority's response to the Caltrain comment letter was inadequate. These claims are barred because Petitioners did not exhaust their administrative remedies. Nevertheless, substantial evidence demonstrates the responses comply with CEQA.

A. Petitioners Failed To Exhaust Administrative Remedies Regarding the Adequacy of Responses to Comments.

As discussed above, to seek judicial relief under CEQA, a party first must exhaust its administrative remedies with specificity; if a party fails to do so, the court must deny relief due to lack of jurisdiction. (Pub. Resources Code, § 21177; *Coalition for Student Action, supra*, 153 Cal.App.3d at p. 1197.) The lead agency "is *entitled* to learn the contentions of interested parties before litigation is instituted." (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 794, emphasis added, internal citations omitted.) A party can exhaust administrative remedies up to the close of the public hearing on project approval. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

Petitioners' responses to comments claims are barred because they failed to exhaust their administrative remedies on this issue. (POB, p. 17:1-21.) The adequacy of a final EIR's responses to comments is a discrete legal issue, separate from other CEQA issues. (Compare Guidelines, §§ 15088 [responses to comments], 15124 [project description], 15126.6. [alternatives]; see also *Twain Harte Homeowners Association v. County of Tuolomne* (1982) 138 Cal.App.3d 664, 677-687 (*Twain Harte*) [treating responses to comments as separate CEQA issue].) There was ample time for Petitioners or anyone else to have exhausted administrative remedies because the Authority made the Final EIR publicly available on April 6, 2012, thirteen days in advance of the April 19, 2012, Board meeting. (2012AR_006843; [notice of availability]; 006950-51 [email blast of availability]; 007419 to 007434 [newspaper notices].) The Authority accepted public comments on the Final EIR at its April 19th meeting, prior to taking action to certify the EIR or approve the project. (2012AR_019037-49, 019063-72.) Petitioners' counsel

and two petitioner representatives spoke twice at the April 19th meeting. (2012AR_019037-39, 69-71 [Flashman]; 019046-47, 68 [TRANSDEF]; 019048-49, 71-72 [California Rail Foundation].) Petitioners' counsel and one petitioner submitted letters on the day of the meeting. (2012AR_019145-47; 019148-52.) None of these communications identified any fault with the Authority's responses to comments. Since neither Petitioners themselves nor any other member of the public exhausted administrative remedies on the adequacy of the responses to comments, this claim is barred. (Pub. Resources Code, § 21177; see also *Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671, 682 [holding responses adequate, but noting in dicta that exhaustion requirement applies to responses to comments claim].)

B. Substantial Evidence Demonstrates The Responses to Comments Provide Good Faith, Reasoned Responses.

Even if the Court elects to reach the merits of Petitioners' responses to comments argument, substantial evidence shows the responses comply with CEQA. For example, Petitioners' primary claim is that the responses to six letters requesting study of the "blended system" as a first-tier alternative in a recirculated program EIR violated CEQA. (See POB, p. 17:8-15.) The Final EIR, however, provided just the type of good faith, reasoned response that CEQA requires in Standard Response 1. (2012 AR_000301-309; *Twain Harte*, *supra*, 138 Cal.App.3d at pp. 680-681.) This nine-page response addresses the collective comments the Authority received about the blended system approach, including comments suggesting that it be treated as a separate, first-tier alternative in the program EIR. (2012AR_000301.) Over a full page of response explains that the blended system is an implementation strategy for the second-tier project between San Francisco to San Jose, rather than a first-tier alternative, and that the range of alternatives studied in the Program EIR remains adequate and reasonable. (2012AR_000308-09.) Petitioners may disagree with the response, but the response is detailed and it provides a thorough and reasoned analysis explaining the Authority's position. (*Twain Harte, supra*, 138 Cal.App.3d at p. 686.)

Moreover, the use of the standard response was appropriate for these cumulative comments because CEQA does not require that all comments receive an individualized response. (*Id.* at p. 680-681; *Citizens for East Shore Parks v. California State Lands Com.* (2011) 202 Cal.App.4th

549, 569.) Nevertheless, the Final EIR provided additional, individualized responses to the comments requesting that the blended system be studied as a separate, first-tier alternative in the program EIR, further showing good faith and a reasoned analysis. (See, e.g., 2012AR_000359-60 and 000375-76 [City of Palo Alto comment 40-260 and response]; 000430-31 and 448-449 [Menlo Park comments 58-142 and 58-143 and responses]; 000454-55 and 456-57 [Atherton comments 59-129 and 59-130 and responses]; 000497, 498 [Preserve Our Heritage comment 52-422 and response]; 000502-03, 605-06 [TRANSDEF comments 56-116–56-121 and responses].) The responses thus address the most significant issues raised in the process. (*Gallegos v. California State Board of Forestry* (1978) 76 Cal.App.3d 945, 954.)

Finally, substantial evidence shows the responses to comments from Caltrain were sufficient. Petitioners claim that the reliance on Standard Response 1 was inadequate to respond to Caltrain's comments that it would only work with the Authority on the blended system. (POB, 17:16-21.) But Standard Response 1 does in fact provide a good faith, reasoned analysis of the blended system as described in the draft and revised business plans, its role as an implementation approach for a second-tier project, and why this is distinct from the generally described four-track proposal in the Program EIR. (2012AR_000303-309.) As discussed in section II.B, *supra*, Standard Response 1 also addresses the potential capacity constraint introduced by the position in the Caltrain letter, and specifically references Chapter 5 of the Partially Revised Final Program EIR and its more detailed discussion of the Revised 2012 Business Plan and phasing of second-tier projects due to "budgetary and funding realities." (2012AR_000302-303, 307.) While the response may not have specifically addressed Caltrain's role as owner of the right-of-way, the comments themselves and other evidence in the record identifies Caltrain's willingness to work with the Authority to bring HST to the Caltrain corridor. Viewed as a whole, and in consideration of their reference to the discussion in the Final EIR, the responses to comments are adequate under CEQA even if this particular response may have been lacking in some respect. (*Twain Harte, supra*, 138 Cal.App.3d at p. 686-87; CEQA Guidelines, § 15151.)

IV. THE AUTHORITY WAS NOT REQUIRED TO RECIRCULATE THE EIR IN RESPONSE TO THE REVISED 2012 BUSINESS PLAN OR THE CALTRAIN COMMENT LETTER

A lead agency must recirculate a draft EIR when "significant new information" is added after circulation, but prior to certification of the final EIR. (Pub. Resources Code, § 21092.1.) New information is "significant" only in those circumstances when "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1129.) New information may also be "significant" if it shows the EIR was "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA Guidelines, § 15088.5, subd. (a)(4).) A lead agency's decision not to recirculate an EIR is presumed correct; a petitioner has the burden of showing otherwise. (*Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 903.)

A. The Blended System Approach for Implementing a Second-Tier Project Between San Francisco and San Jose Did Not Require the Authority to Recirculate the EIR.

Petitioners claim that new information about a blended system, specifically, that it "might" be the "final step" of the project (POB, p. 18:12) and thus a viable and less environmentally-impacting project alternative, triggers recirculation. This is incorrect. Nothing in the Revised 2012 Business Plan changed the project under study (see *supra*, § I.A); as discussed in section II.A, *supra*, nothing about the blended system approach renders it a first-tier alternative; and no proposals for a blended system "alternative" trigger recirculation under CEQA.

Significant new information includes "a *feasible* project alternative or mitigation measure *considerably different from others previously analyzed* which would clearly lessen the significant environmental impacts of the project," but the lead agency declines to adopt. (CEQA Guidelines, § 15088.5, subd. (a)(3) emphasis added.) As discussed in section II.A, *supra*, notwithstanding that it did not consider the blended system approach to be a first-tier alternative, the Authority attempted to evaluate two proposals (arising out of comments to the Program EIR) to treat a

blended system approach as if it were an "alternative" to the programmatic project. The Authority determined that both the proposal to utilize the ACRP with a blended system on the Peninsula, and the proposal to combine a blended system on the Peninsula with one of the 21 network alternatives already utilizing the Caltrain corridor, did not merit further consideration. The ACRP proposal fails to meet the purpose and need of the Program EIR's project, and the blended plus existing alternatives proposal is not a new and distinct locational approach that merits study at the first tier. (See *supra*, § II.A.) Thus, nothing about the blended system approach triggered recirculation under CEQA.

Most importantly, recirculation was not required because the public had ample opportunity to review and understand the Authority's current thinking on the blended approach. (See *Silverado Modjeska Recreation & Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 308 [recirculation not required where "new information does not materially implicate the public's right to participate"] (*Silverado*).) Petitioners insist that the blended system approach "deserved exploration at the program level" (POB, p.19:8-9), yet ignore the fact that the programmatic analysis of the blended approach was featured prominently in both the Draft and Final EIR. (2012AR_007555, 7560 [DEIR]; 000239, 243-44 [FEIR], 000304-07.) The EIR analyzed the reduced impacts attributable to the lesser amount of construction (e.g., traffic, air quality); reduced localized traffic impacts around stations; lower project benefits; and speculative reductions in benefits to safety and other traffic impacts. (2012AR_000243-44; 000752-57 [addendum].) The public, and petitioner representatives, commented at length on the blended system approach, including suggesting the proposals discussed above. (See § III, *supra*.) The Board engaged with the issue of the blended system approach in deciding whether to certify the Program EIR. (2012AR_019079.) Given this record, it was reasonable of the Authority to conclude that recirculation to address the blended system approach, including analyzing it as a first-tier alternative, was not necessary in light of the "abundant record of prior public participation on the precise issue" at hand. (*Silverado*, *supra*, 197 Cal.App.4th at 307.)

B. The Caltrain Comment Letter Did Not Require the Authority to Recirculate the EIR.

As discussed in sections II.B and III.A, *supra*, Petitioners have failed to exhaust their administrative remedies on the issue of the Caltrain letter. But even if Petitioners had exhausted, nothing about this letter constituted significant new information under CEQA so as to trigger recirculation. This letter, together with other Caltrain documents, expresses Caltrain's willingness to collaborate with the Authority on a blended approach, while highlighting the potential issue of a capacity constraint on high-speed rail service. (See § II.B, *supra*.) The capacity constraint issue was disclosed and commented upon, and factored into the EIR's weighing of alternatives. (See § II.B, *supra*.) As described in section II.B, *supra*, nothing about the Caltrain letter undermines the reasonableness of the EIR's range of alternatives or would force consideration of previously-rejected alternatives, such as Highway 280. The blended approach was a prominent part of the EIR and a focus of public attention; the Caltrain letter expressing support for the blended approach and highlighting the capacity constraint issue did not constitute "significant new information" requiring recirculation under CEQA. (Pub. Resources Code, § 21092.1.)

V. PETITIONERS DO NOT CONTEST THE ANALYSIS IN THE PARTIALLY REVISED FINAL PROGRAM EIR FOR ANY ISSUES SPECIFICALLY IDENTIFIED IN THE ATHERTON 1 AND ATHERTON 2 RULINGS.

Petitioners' brief is focused entirely on their theory that the blended system approach discussed in the Business Plan must be analyzed in the Program EIR. Petitioners do not contest any of the analysis in the Program EIR in Chapters 2 – 4, addressing the specific issues identified by the Court in the Atherton 1 and Atherton 2 Rulings.[8] These issues, as discussed in Respondent's Opening Brief, include:

- Traffic, noise and vibration, and construction impacts of shifting and narrowing Monterey Highway (ROB, pp. 7:5–14:21; see Atherton 1 Ruling, pp. 10:6-20:7).

[8] In its November 2011 rulings, this Court granted in part and denied in part the Authority's request to discharge the November 2009 writ in the Atherton 1 case, and granted in part and denied in part the Atherton 2 petitioners' writ petition.

- Traffic impacts of the potential for reduced access to surface streets on the Peninsula. (ROB, pp. 14:24–19:4; see Atherton 1 Ruling, pp. 28:15-29:24.)
- Noise and vibration impacts due to the potential for freight trains to shift to the outside tracks of a four-track alignment on the Peninsula. (ROB, pp. 19:7-17; see Atherton 1 Ruling, pp. 22:14-23:3.)

Under CEQA, an EIR is presumed adequate, and a petitioner has the burden of proving otherwise. (Pub. Resources Code, § 21167.3; *Al Larson, supra*, 18 Cal.App.4th at p. 740.) By offering no argument or evidence regarding these topics, Petitioners concede the Program EIR complies with the rulings and with CEQA. (See *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 462 [where topics ordered in writ to be addressed in revised EIR were unchallenged by petitioners, compliance with writ not reviewed by court].)

CONCLUSION

The Authority has taken all steps necessary to comply with the writs. Substantial evidence supports the analysis in the Partially Revised Final Program EIR and the document serves its informational role. The Authority respectfully requests that the Court discharge the writ.

Dated: October 31, 2012

Respectfully Submitted,

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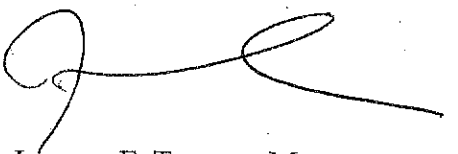

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Case Name: ***Town of Atherton, et al. v. California High-Speed Rail Authority***

Case No.: **Sacramento County Superior Court No. 34-2008-80000022**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 31, 2012, I served the attached **CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S REPLY BRIEF IN SUPPORT OF RETURN AND MOTION TO DISCHARGE WRITS** by transmitting a true copy via electronic mail, and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 31, 2012, at Sacramento, California.

SUSAN HAUCK
Declarant

Susan Hauck
Signature